No. 01-1368

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IN THE

Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

v.

WILLIAM HIBBS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, CONNECTICUT, ILLINOIS, MINNESOTA, NEW MEXICO, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE* STATES

The *amici curiae* States urge affirmance of the Ninth Circuit Court of Appeals decision holding that Congress validly abrogated the States' Eleventh Amendment immunity when it enacted the family medical care provision of the Family Medical Leave Act (FMLA), 29 U.S.C. § 2612(a)(1)(C). We file this brief to provide the Court with our view of the proper balance between two matters of extreme importance to the States: eradication of gender discrimination in the workforce and protection of the States' Eleventh Amendment immunity from suit.

Although the States more typically advocate the application of Eleventh Amendment immunity, allowing our citizens to enforce their FMLA rights without restriction is consistent with the obligation of attorneys general of the *amici curiae* States to protect the public interest by ensuring that workplace gender discrimination against our citizens, with all of its vestiges, is eliminated. This interest is particularly acute in light of the well-documented history of state-sponsored discrimination against women in the workforce -- discrimination that was premised on the stereotypic assumption that women's primary responsibility lay at home, not at work, and that women therefore should meet family care needs at the expense of their participation in the workforce.

SUMMARY OF ARGUMENT

When Congress enacted the FMLA in 1993 to provide workers with the opportunity to meet family care needs without the loss of their jobs, it recognized that the absence of adequate gender-neutral family leave policies in the public and private sectors had a disparate impact on women. Congress also had before it a legislative and judicial record

indicating that the lack of adequate family leave policies was a vestige of a long history of unconstitutional gender discrimination, a history to which the States had directly contributed. Not only did many of the States maintain discriminatory leave policies for their own employees when the FMLA was enacted, but over the past century the States had enforced gender discrimination across the private and public sectors through a multitude of state workplace laws that disadvantaged women and reinforced the stereotypical notion that women should undertake family care responsibilities so that men would be free to fulfill their responsibilities as breadwinners. Discriminatory leave policies continued in both the private sector and in state governments despite Congress's repeated efforts to eradicate gender discrimination in employment by enacting Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and the Pregnancy Discrimination Act.

With the FMLA, Congress provided a congruent and proportional means of remedying these effects of past constitutional violations and preventing future ones. Congress enacted a remedial scheme that requires employers to provide both male and female employees a minimum amount of unpaid leave to care for seriously ill family members. The FMLA's even-handed, objective application to both men and women avoids the risk that gender-specific leave availability will lead to further discrimination, while counteracting the stereotype that women should be the family caretakers. Moreover, by limiting the law's applicability, including specific exemptions to accommodate the needs of state employers, the FMLA appropriately balances the needs of employers with meaningful protection against gender discrimination. Accordingly, Congress's enactment of the FMLA's comprehensive remedial scheme, including its abrogation of the States' Eleventh Amendment immunity, was

a proper exercise of its power to enforce the Equal Protection Clause of the Fourteenth Amendment and protect both men and women from gender discrimination.

ARGUMENT

IN ENACTING THE FAMILY MEDICAL CARE PROVISION OF THE FMLA, CONGRESS PROPERLY ABROGATED THE STATES' ELEVENTH AMENDMENT IMMUNITY.

The heart of the FMLA is found in § 2612(a)(1), which entitles eligible employees to take leave totaling twelve weeks per calendar year for one or more of the following reasons:

> (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter;
>
> (B) Because of the placement of a son or daughter with the employee for adoption or foster care;
>
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition;
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

This case involves a challenge to § 2612(a)(1)(C), the "family medical care provision" of the FMLA. Petitioners argue that this provision cannot be enforced against the States in private suits for money damages because in passing this provision of the FMLA, Congress did not validly abrogate the States' Eleventh Amendment immunity.

Petitioners misleadingly state (Pet. Br. 31, 45) that seven courts of appeals have held that the FMLA does not abrogate the States' Eleventh Amendment immunity. In fact, only one court of appeals, in *Kazmier* v. *Widmann*, 225 F.3d 519 (5th Cir. 2000), has so held with respect to the provision at issue in this case. The other courts held, and the rulings in those cases are clear, that a provision of the FMLA not at issue here, the personal medical leave provision, 29 U.S.C. § 2612(a)(1)(D), which entitles an employee to unpaid leave for his or her own serious health condition, does not abrogate the States' Eleventh Amendment immunity. *See, e.g., Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000). These cases do not conflict with the Ninth Circuit's decision here because the family medical care provision and the personal medical leave provision operate in different circumstances and reflect different concerns. *See Board of Trustees v. Garrett*, 531 U.S. 356, 360 n.1 (2001).

Congress may abrogate the State's immunity only when it expresses "unequivocally" its intent to do so and when it "acts pursuant to a valid grant of constitutional authority." *Garrett*, 531 U.S. at 363. Although Congress may not abrogate a State's Eleventh Amendment immunity through the exercise of its Article I power, *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996), Congress may subject nonconsenting States to suit in federal court when done pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. *Garrett*, 531 U.S. at 364.

It is undisputed that Congress unequivocally stated its intent to abrogate the States' immunity. Rather, the question before the Court is whether 29 U.S.C. § 2612(a)(1)(C) is a valid exercise of Congress's Section 5 power, and thus, a valid abrogation of the States' Eleventh Amendment immunity. Applying this Court's precedent in *Garrett*, *Kimel*,

and other cases, the family medical care provision of the FMLA should be sustained as appropriate Section 5 legislation.

A. Congress Expressly Invoked Its Section 5 Powers in Enacting the FMLA

As a threshold matter, Petitioners contend (Pet. Br. 21-27) that Congress was not legislating under Section 5 of the Fourteenth Amendment when it enacted the FMLA because its text does not mention "Section 5 of the Fourteenth Amendment" or "directly prohibit discrimination." Contrary to Petitioners' argument, Congress expressly invoked Section 5 as one of its bases for enacting the FMLA.

The FMLA has five purposes, set forth in the text of the Act. The first two are to balance the demands of the workplace and family and to entitle employees to reasonable family and medical leave. 29 U.S.C. § 2601(b)(1), (2). The third and fourth are to accomplish the first two in a manner that accommodates the legitimate interests of employers and minimizes the potential for gender discrimination without running afoul of the "Equal Protection Clause of the Fourteenth Amendment." 29 U.S.C. §§ 2601(b)(3), (4). The fifth purpose is "to promote the goal of equal employment opportunity for women and men, pursuant to such clause." *Id.* § 2601(b)(5).

Given that the FMLA sets forth as two of its goals minimizing discrimination on the basis of sex and promoting equal employment opportunity for women and men, citing the Equal Protection Clause of the Fourteenth Amendment in both cases, there can be no doubt that Congress properly invoked its enforcement powers under Section 5. In contesting this conclusion, Petitioners acknowledge only § 2601(b)(4), arguing that the reference to the Equal

Protection Clause in that provision merely reflects Congress's attempt to ensure that the FMLA does not itself violate the Fourteenth Amendment (Pet. Br. 31, 39-41). Even if this strained interpretation of § 2601(b)(4) were correct, it ignores § 2601(b)(5) altogether, a plain reading of which allows for no other conclusion but that enforcement of the Equal Protection Clause was a basis for enacting the FMLA.

The FMLA's statement of findings confirms that the family medical care provision, in particular, is aimed at remedying gender discrimination and promoting gender equity. In § 2601(a)(5), Congress found that "due to the nature of the roles of men and women in our society, the primary responsibility for family care-taking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." Congress's finding in § 2601(a)(6), that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender," explains Congress's selection of a gender-neutral leave requirement to address the disparate impact identified in § 2601(a)(5).

B. The Family Medical Care Provision of the FMLA Is Appropriate Section 5 Legislation

Congress's enforcement power under Section 5 of the Fourteenth Amendment includes the "authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Garrett*, 531 U.S. at 365. "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997) (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)).

Whether a particular congressional response enforces the States' obligations under the Fourteenth Amendment is determined by comparing the scope of the enactment to the constitutional right being protected. If the scope of the remedy is broad, it must be justified by a proportionately pressing need. "Accordingly, section 5 legislation reaching beyond the scope of section 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365.

1. The same history that makes state-sponsored gender classifications suspect is necessarily relevant in evaluating the nature and scope of the problem of gender discrimination that Congress attempted to address and whether the FMLA is a congruent and proportional response to that problem

As evidenced in the purpose and findings sections of the Act, the FMLA enforces the Fourteenth Amendment guarantee against state-sponsored, purposeful gender discrimination, which warrants an intermediate level of judicial scrutiny. Under intermediate scrutiny, state action that classifies individuals on the basis of gender are unconstitutional unless the entity defending such action demonstrates that it is "substantially related to the achievement of [important governmental] objectives." *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 60-61 (2001); *accord United States* v. *Virginia*, 518 U.S. 515, 533 (1996); *Wengler* v. *Druggist Mut. Ins. Co.*, 446 U.S. 142, 150 (1980). The principal reason for such elevated scrutiny is this Nation's "long and unfortunate history of sex discrimination." *United States* v. *Virginia*, 518 U.S. at 531 (quoting *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality)).

Heightened scrutiny reflects a judicial determination as to the scope and intractability of the discrimination at issue; as such, it can properly inform Congress's decision to enact remedial legislation. The same history that makes state-sponsored gender classifications suspect is necessarily relevant in evaluating the nature of the problem Congress is attempting to address in enacting remedial or prophylactic legislation to "promote the goal of equal employment opportunity for men and women." 29 U.S.C. § 2601(b)(5). It should therefore be considered by the courts in evaluating the history and pattern of discrimination and whether the legislation is congruent and proportional to fully remedy and deter that discrimination. Especially where Congress has previously acted in response to a long history of unconstitutional discrimination, as it has here, it is necessary to look to prior legislation, in addition to case law documenting discrimination, to determine whether there was a sufficient history and pattern of unconstitutional discrimination to justify the need for prophylactic Section 5 legislation.

The Court has routinely taken this approach in determining whether legislation enacted to remedy or deter race discrimination constitutes a valid exercise of Congress's enforcement powers. In *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), where the Court sustained the Voting Rights Act of 1965 as a valid exercise of Congress's enforcement powers under the Fifteenth Amendment, the Court wrote, "[t]he constitutional propriety of the [Act] must be judged with reference to the historical experience which it reflects." There, in an extended discussion, the Court outlined the long history of judicial decisions and congressional actions addressing racial discrimination in voting, from the ratification of the Fifteenth Amendment, to the States' repeated attempts to circumvent the Amendment, to congressional voting rights legislation in 1957, 1960 and

1964, all of which failed to eradicate the problem. 383 U.S. at 308-314. The Court explained that such historical data "demonstrates the variety and persistence of [state laws] designed to deprive Negroes of the right to vote," thereby informing the inquiry whether the legislation at issue was congruent and proportional to the problem. *Id.* at 311; *see also Oregon* v. *Mitchell*, 400 U.S. 112, 132-134 (1970) (Black, J.); *id.* at 234-235 (Brennan, White & Marshall, JJ.); *id.* at 284 (Stewart, J. joined by Blackmun, J., & Burger, C.J.) (relying on prior judicial decisions, prior legislation, and common knowledge in sustaining a nation-wide ban on literacy tests despite geographically limited evidence of abuse).

More recently, this Court recognized the common sense of this approach in *Kimel*, where it noted that "lack of support [in the legislative record] is not determinative of the § 5 inquiry." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000); *see also Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 646 (1999) (same). The concurring opinion in *Garrett* similarly looked for confirming judicial documentation of unconstitutional discrimination:

> If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations. This confirming judicial documentation does not exist.

531 U.S. at 375-376 (Kennedy and O'Connor, JJ., concurring).

The rationale for imputing historical knowledge to Congress was cogently explained in a recent decision of the

Seventh Circuit, where the court upheld as a valid abrogation the 1972 extension of Title VII provisions to the States, despite a sparse legislative record of state violations. In *Nanda* v. *Bd. of Trustees*, 303 F.3d 817 (7th Cir. 2002), the court held that Congress's familiarity with the problems of gender and race discrimination through prior legislation "'reduces the need for fresh hearings and prolonged debates,' * * * 'particularly given the well-documented history of gender [and race] discrimination in this Nation, a history that is embodied in the Supreme Court's own jurisprudence.'"

The Ninth Circuit took a different approach to ascertaining the validity of Section 5 legislation where the scope of the right at issue includes heightened judicial review of potential violations. The Ninth Circuit reasoned that because, under intermediate scrutiny, state-sponsored gender discrimination is presumptively unconstitutional, Section 5 legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional. *Hibbs*, 273 F.3d at 857. We disagree with this framework because the use of such an analytical "shortcut" fails to ensure that the States' sovereignty interests are given due weight. While, as discussed above, a judicial determination that heightened review is required helps define the scope of the right at issue, and the historical context of that determination provides evidence of a history and pattern of unconstitutional discrimination, the inquiry nonetheless properly remains a comparison of the two to determine whether the particular remedy is congruent and proportional to the constitutional right being enforced and to ensure that Congress has not effectively redefined the constitutional obligations of the States.

2. The legislative and judicial record demonstrates that Congress viewed the provision of family medical care leave as a crucial step in its ongoing efforts to eradicate gender discrimination and its vestiges from the workforce

In light of the pivotal role historical context plays in the Section 5 inquiry, Petitioners' gravest error is to view the FMLA in isolation from Congress' ongoing efforts to eradicate gender discrimination in the workplace. In addition to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, which Congress extended to the States in 1972, 42 U.S.C. § 2000e(a), Congress passed the Equal Pay Act in 1963, 29 U.S.C. § 206(d), extended it to the States in 1974, 29 U.S.C. §§ 203(d), (e)(2), (x), and 216(b), and passed the Pregnancy Discrimination Act (PDA) in 1978, 42 U.S.C. § 2000e(k).

The FMLA is the latest in this series of legislative steps to remedy and deter gender discrimination. In identifying and choosing to remedy the problem of discriminatory leave policies, Congress was informed by both the history of its own legislation in this area and the myriad of judicial decisions evidencing the States' enforcement and reinforcement of gender stereotypes in employment for more than a century.

a. Congress was well aware of the States' involvement in this Nation's long history of gender discrimination in employment

As an active participant in eliminating gender discrimination in employment for three decades, Congress was clearly aware of the long history of state laws that gave force and effect to the stereotype that women's primary duties were at home at the expense of their equal participation in

the workforce. From state laws that precluded women from performing certain jobs, *e.g.*, *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873) (practice of law); *Goesaert* v. *Cleary*, 335 U.S. 464 (1948) (bartending); *Oregon* v. *Hunter*, 300 P.2d 455 (Ore. 1956) (en banc) (wrestling); to state laws that limited the maximum number of hours that women could work, *e.g.*, *Muller v. Oregon*, 208 U.S. 412, 419 n.1 (1908) (listing and approving laws from nineteen States); *People v. Elerding*, 98 N.E. 982 (Ill. 1912) (listing laws from 27 states); *Corning Glass Works v. Brennan*, 417 U.S. 188, 193 n.7 (1974) (noting that Pennsylvania and New York had maximum hours laws on the books as late as 1969); to state laws that prohibited women from working during nighttime hours, *e.g. New York v. Charles Schweinler Press*, 108 N.E. 639 (N.Y. 1915) (affirming statute prohibiting women from working in factories at night and noting that by 1913, nine other States had passed such laws), all were based on stereotypic beliefs regarding women's roles at home and work.

Frontiero v. *Richardson* began the cascade of decisions striking down state and federal employment-related laws premised on this stereotype, which it described as follows:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many occupations of civil life. The constitution of the family organization, which is founded on divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a

> distinct and independent career from that of her husband.

411 U.S. at 684-685 (quoting *Bradwell*, 83 U.S. at 141); *see*, *e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977) (striking down federal survivor benefits law because its underlying assumption reflected "'old notions and archaic and overbroad generalizations'" about the roles and relative abilities of men and women); *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (striking down federal unemployment benefits law because its differential treatment of men and women constituted "baggage of sexual stereotypes * * * that presumes the father has the primary responsibility to provide a home and its essentials * * *, while the mother is the center of home and family life"); *Wengler*, 446 U.S. at 148 (striking down state survivor benefits law because it suffered from "offensive assumption" that women's primary role was as caregiver, not breadwinner).

The Court recognized that as a result of this stereotype, women faced "pervasive, although at times more subtle" discrimination in the job market. *Frontiero*, 411 U.S. at 684-685. Indeed, as recently as 1996, the Court was called upon to reiterate the rule that the justification for different treatment of men and women "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States* v. *Virginia*, 518 U.S. at 533.

b. The legislative record supports Congress's view that the lack of adequate family medical care leave derives from discriminatory notions of gender roles and continues to prevent women from participating equally in the workforce

As the legislative record of the FMLA indicates, the lack of family medical care leave reflects this same "overbroad generalization" about the relative roles of men and women. It also has a disparate impact on women. Congress enacted the family medical care provision of the FMLA to address this failure, a vestige of unconstitutional employment discrimination that only became evident after significant discriminatory barriers to equal employment opportunity were lifted and a critical mass of women entered the workforce.

The legislative history of the FMLA references the work left undone by the earlier anti-discrimination laws, specifically, the need for family care leave. For example, Congress heard testimony in 1987 expressing general dissatisfaction with the existing anti-discrimination laws because they had not addressed the problem of employment policies that continued to embody the discriminatory presumption that "women's role is to stay home and care for the family and men's role is to work outside the home for a paycheck":

> Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women's place is in the home. This prevailing ideology about women's roles has in turn justified discrimination against women when they do work. * * * Women are protected from outright

> workplace discrimination because of their sex or because of their roles as mothers or because of their pregnancies and related medical conditions by Title VII [] and the [PDA]. But our social structures, and most particularly our employment policies, continue to operate as if women's role is to stay home and care for the family and men's role is to work outside the home for a paycheck.[1]

While the intervening decades between passage of Title VII and the FMLA saw a profound increase in the number of women entering the workforce, S. Rep. No. 103-3, at 5-6 (1993), leave policies in both the public and private sector were still premised on the discriminatory presumption, reinforced by more than a century of unconstitutional employment laws and practices, that women would be at home to take care of the family. As Congress explained, the legislation

> speaks tellingly to that crucial intersection between job and home where family needs clash with the demands of a work world which relies as never before on female labor but whose personnel policies are more suited to a male work force with wives performing the traditional and necessary functions in the home.

H.R. Rep. No. 99-699, pt. 1, at 10 (1986). In Congress's view, "our workplaces are still too often modeled on the unrealistic and outmoded idea of workers unencumbered by family

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1. *Family and Med. Leave Act of 1987: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 100th Cong. 235 (1987) [hereinafter *1987 House Hearing*] (statement of Donna Lenhoff, Women's Legal Def. Fund).

responsibilities." H.R. Rep. No. 103-8, pt. 1, at 17 (1993); *see also id.* at 21 ("Private sector practices and governmental policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family.").

The Senate Report identifies the lack of family care leave, in particular, as a "glass ceiling" blocking women's ability to participate equally in the workforce:

> I think people misunderstand the glass ceiling problems. They don't start when a women or a person of color suddenly reaches the managerial position in corporation America. They begin really with the myriad of ways that women often find themselves sidetracked or discriminated against in employment in that corporation all along the line. And requiring family leave does quite the opposite than the assertions we often hear by the opposition, because what it guarantees for women workers and men workers is that they won't be forced off the job; they won't lose important benefits because they've got family responsibilities. And those safeguards essentially keep women on a track to promotions and to crashing through that glass ceiling.
>
> But for legislation like this, women's opportunities are truly artificially limited and barred.

S. Rep. No. 103-18, at 49 (1993).

Congress's foremost concern with respect to family medical care leave was the disproportionate impact its absence had on female employees. Cited again and again in

the legislative record are statistics showing that women disproportionately bear the responsibility for family care. *See, e.g.*, S. Rep. No. 103-18, at 4 ("Two-thirds of these caregivers [for aging parents] are working women."); H.R. Rep. No. 103-8, pt. 2, at 17 (1993) (citing HHS estimate that "2.2 million people, predominantly women, cared for 1.2 million frail elderly people in 1982. Approximately one million of them were employed for some time during the care-giving experience."); *id.* at 37 ("Though women have entered into the workforce in greater numbers, they continue to be the primary caregivers of children, elderly parents and relatives. It is expected that women will spend about 17 years caring for children and 18 years caring for an elderly relative."); H.R. Rep. No. 102-135, pt. 1, at 20 (1991) ("The National Council on Aging estimates that 20 to 25% of the more than 100 million American workers have some caregiving responsibility for an older relative. Two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women.").

The impact of the lack of adequate family care leave on women is also well-documented in the record. Congress found that women's careers were disparately affected by family care responsibilities. 29 U.S.C. § 2601(a)(5). It also heard evidence that

> [t]he adverse impact on professional women of having to juggle career and family is devastating. Too often women are forced to either forego having families or to compromise their career advancement during their child bearing years. * * * Studies also show that women who take time off to have and care for children inevitably fail to 'catch up' financially with their male counterparts. A 1983 study of 71 women in Harvard Law School Class of 1974 * * * found that the demands

> of family life were the most common reason women left high powered legal professions and that most could not stay on career fast tracks and meet family responsibilities.

1987 House Hearing, *supra*, *at* 445-446 (statement of Women's Bar Assoc. of D.C.); *see also* H.R. Rep. No. 102-135, pt. 1, at 31 (1990 study by the Southport Institute for Analysis "estimated that 11 to 13% of women caring for elderly parents actually quit their jobs to provide care.").

c. Congress also had before it evidence of expressly discriminatory leave policies by public and private employers

Congress also had before it evidence of public and private leave policies that expressly discriminated on the basis of gender. Professor Susan Ross of Georgetown University Law Center testified to "a number of studies * * * in which it's shown that employers in this country that are giving family leaves to their workers are not giving it non-discriminatorily[;] they are, by and large, giving it only to women, not to men. It's fairly flagrant discrimination."[2] In particular, the legislative record includes statistical evidence that private employers were more likely to grant parental leave to women than to men. H.R. Rep. No. 103-8, pt. 1, at 55-56 (Bureau of Labor Statistics (BLS) studies from 1990 and 1991); *see also* S. Rep. No. 103-3, at 14-15 (1993) (similar results from 1989 BLS study). The statistics for public employers mirrored those for private employers. A study by the Yale Bush Infant Care Leave Project revealed that "[t]he proportion and construction of leave policies

2. *Parental and Med. Leave Act of 1987: Hearing on S. 249 Before the Subcomm. on Children, Families, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources, Part 2*, 100th Cong. 536 (1987) [hereinafter *1987 Senate Hearing*].

available to public sector employees differs little from those offered private sector employees."[3] Meryl Frank, Director of the Yale Bush Project, testified:

> We did a survey of the public sector, a survey of Federal employees, all 50 States, and of the military. We have studied small business, mid-size businesses and large businesses to find out what they are offering. * * * We found that public sector leaves don't vary much from private sector leaves.

Id. at 29-30.

These statistics are supported by other evidence of express discrimination in state parental leave policies. *See, e.g.*, *1987 Senate Hearing*, *supra*, at 364-374 (testimony of Elaine Gordon, Fla. H.R., that leave to care for newborn children is only granted to women and that Florida rejected extending such leave to men); *id.* at 385 (testimony of Gerald McEntee, Int'l President, American Fed'n of State, County and Mun. Employees) ("the vast majority of [public employment] contracts, even though we look upon them with great pride, really cover essentially maternity leave, and not paternity leave."); *Family and Med. Leave Act of 1989: Hearing on H.R. 770 Before the Subcomm. on Labor-Mgmt. Relations of the House Comm. on Educ. and Labor*, 101st Cong. 271 (1989) (statement of the Concerned Alliance of Responsible Employers) (thirteen States grant parental leave to women but not men); *1986 House Hearing*, *supra*, at 147 (testimony by the Washington Council of Lawyers) ("Parental leave for fathers * * * is rare. * * * Where child-care leave policies do exist, men, both in the public and private sectors,

3. *Parental and Med. Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 99th Cong. 33 (1986) [hereinafter *1986 House Hearing*].

receive notoriously discriminatory treatment in their requests for such leave.").

The Ninth Circuit majority acknowledged that the BLS and Yale Bush Center studies addressed only parental leave, not leave to care for a sick family member, but correctly concluded that these studies nevertheless provide evidence of state-sponsored discrimination in granting leave to care for a sick family member. *Hibbs*, 273 F.3d at 859. This is true because both parental and family leave address the same concerns and the failings in both were premised on the identical assumption -- that women should be available to fill the role of caregiver at the expense of their workplace performance. The record before Congress of widespread parental leave policies that expressly discriminated on the basis of gender indicate that this stereotype was very much alive when Congress enacted the FMLA.

d. Prior to the enactment of the FMLA, the States had not led efforts to mandate family medical care leave

The State of Alabama contends in its *amici curiae* brief (Ala. Br. 5-9) that in enacting the FMLA, Congress could not have addressed a history of unconstitutional discrimination by the States because the States were actually leaders in addressing the family and medical leave needs of their employees. In Alabama's view, this was so principally because many States allowed their employees to use sick leave for care of ill family members. This argument is wholly lacking in substance.

Examined more closely, the "flexible" sick leave policies cited by Alabama came nowhere near addressing leave for serious illnesses of family members -- the aim of the family medical care provision of the FMLA. As Alabama

acknowledges (Ala. Br. 6-8), state sick leave allowances used for care of ill family members also included sick leave for the employee. To the extent the sick leave was used for the employee's own illness, there would be none left to care for ill family members. Moreover, even today, only six States specifically provide job protection in their sick leave policies to prevent employees from being penalized for exercising their right to sick leave.[4] And most States with "flexible" sick leave severely restrict the amount of time that may be taken and/or the definition of illness or immediate family member.[5]

For example, in Alabama, state employees accrue four hours of sick leave bi-weekly, or approximately thirteen days of sick leave per year. Further, granting of sick leave to take care of an ill family member is discretionary, not mandatory, and the leave-taker is not guaranteed his or her job upon return from leave. Ala. Admin. Code. 670-X-14-.01 (2001). Other States' "flexible" sick leave policies are similarly limited. Delaware, for example, a signatory to Alabama's brief, allows sick leave to be granted in the event of serious illness to a member of the employee's immediate family, but such sick leave accrues at the rate of only three days per year. Del. Code. Regs. 10-450-002 (2002). In Nebraska, another signatory, there is no job protection. Employees with less than five years on the job accrue twelve days of sick leave per year, and "immediate family member" is narrowly defined and can only be broadened at the discretion of the state agency's head. Neb. Admin. R. & Regs. ch. 9, § 005 (2002).

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4. California, Kentucky, Maryland, Michigan, Minnesota and South Carolina. Cal. Code Regs. tit. 2, § 599.745, 745.1 (2002); 101 Ky. Admin. Regs 2:102, 3:015 (2001); Md. Code Ann., State Pers. & Pens. § 9-505 (1997); Mich. Civ. Serv. Reg. 5.10 (2001); Minn. Stat. § 181.9413 (2000); S.C. Code Ann. Regs. § 19-710.04 (2002).

5. *See* Ala. Br., Appendix 1a-7a (statutes cited therein).

Nor were the States leaders in enacting legislation requiring employers to provide family care leave. A survey of state statutes shows that prior to 1985, when the first precursor to the FMLA was introduced in Congress, thirty-nine States had no state-mandated leave. Of the eleven States that mandated the availability of leave, seven required only that public and private employees provide pregnancy disability leave;[6] neither men nor women had job protection for care of children or sick family members. Even in the other four States that provided for leave, the leave allowed was minimal. Massachusetts allowed women -- not men -- up to eight weeks of leave for the birth or adoption of a child under the age of three. Mass. Gen. Laws Ann. ch. 149, § 105D, ch. 151B, §§ 1(5), 4(11A)(1972). One State, Delaware, mandated the provision of leave only for government employees. Del. Code Ann. tit. 29, § 5116 (1984). Kentucky required the provision of up to six weeks of leave for the adoption of a child for any employees; childbirth leave was not covered by state statute at all. Ky. Rev. Stat. Ann. § 337.015 (1982). Only one State, Illinois, expressly allowed leave for the care of an ill family member, and that leave only protected government employees. Ill. Ann. Stat. ch. 127, § 63b108c (1983).

Implicitly acknowledging how minimally the States had addressed the issue of family care leave prior to Congress's

6. California, Connecticut, Hawaii, Kansas, Montana, New Hampshire, and Washington. Cal. Gov't Code §§ 12945(1)-(2), 12960-75 (1980); Conn. Gen. Stat. §§ 46a-60(a)(7)(B)-(D), 46a-82 to 46a-96 (1973); Hawaii Dep't of Indus. and Labor Relations: Sex and Marital Status Discrimination Regs., 12-23-1 to 12-23-22, 12-23-58, Fair Empl. Practice Manual (BNA) 453:2301-2308, 453:2328 (1982); Kansas Comm'n on Civil Rights, Guidelines on Discrimination Because of Sex, §§ 21-32-6 (D), 21-41-1 to 45-25 (1974); Mont. Code Ann. §§ 49-2-310 to 49-2-311, 49-2-5-1 to 509 (1984); N.H. Rev. Stat. Ann. § 354:A:9-10, N.H. Code Admin. R. Hum. 402.03, 201.01-212.06 (1984); Wash. Admin. Code §§ 162-08-011 to 700, 162-30-020 (1973).

initiative, Alabama argues in its *amici* brief (Ala. Br. 19) that States became "leaders" on these issues "since federal family leave legislation was first introduced." The relevant issue in determining the breadth of the problem Congress sought to address in passing the FMLA, however, is not what States did *after* Congress began considering family and medical leave legislation in 1985, but what they did *before*.

But even by 1993 when the FMLA was enacted, the States were by no means leaders on family medical leave issues. In 1993, thirty-two States did not provide government employees with job-protected leave for the care of an ill family member.[7] Forty-two States still had no legislation mandating private employers to provide leave for the care of an ill family member.[8] Nineteen States still had no statutory job-protected leave -- not even pregnancy disability leave.

7. The eighteen States that did require job-protected leave for government employees for the care of a seriously ill family member were the eight States cited in footnote six that mandated the leave for public and private employees, as well as the following ten states that provided such leave only for public employees: Alaska, Connecticut, Colorado, Florida, Georgia, Hawaii, Illinois, North Dakota, Oklahoma, West Virginia. *See* Alaska Stat. 23.10-500-23.10.550 (1992); Conn. Gen. Stat. Ann. 5-193, *et seq.*; Colo. Code Regs. P7-4-12, *et seq.* (1989); Fla. Stat. Ann. 110-221 (1991); Ga. Code Ann. 45-24-1 through 45-24-9 (1993); Haw. Rev. Stat. 79-32, 398-1 to 398-10 (1992); Ill. Ann. Stat. ch. 127, 63b108c (1983); N.D. Cent. Code 54-52.4 (1990); Okla. Stat. tit. 74, 840.7C (1989); W. Va. Code 21-5D-1 to 21-5D-9 (1989).

8. The eight States that did mandate such leave for private employers were California, Maine, New Jersey, Oregon, Rhode Island, Vermont, Washington, Wisconsin. Cal. Gov't Code 12945(1)-(2) (1991); Me. Rev. Stat. Ann. tit. 26, 844-49 (1991); N.J. Stat. Ann. 34:11B-1 to 34:11B-16 (1990); Or. Rev. Stat. 659.560-570 (1992); R.I. Gen. Laws 28-48-1 to 28-48-10 (1990); Vt. Stat. Ann. tit. 21, 471-474 (1992); Wash. Rev. Code 49.78.020, 49.78.030 (1989); Wisc. Stat. Ann. 103.10 (1988).

Of the States that provided for some sort of leave, twenty States covered both private and government employees;[9] eleven States required that leave be available for government employees only.[10] Additionally, by 1993, Tennessee had adopted a policy mandating the availability of maternity leave for women but not paternity leave for men. Tenn. Code Ann. § 4-21-408 (1988) (leave of up to four months for pregnancy disability and nursing). And, like many States with legislation

9. The twenty States were California, Connecticut, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, Ohio, Oregon, Rhode Island, Tennessee, Vermont, Washington, and Wisconsin. *See* Cal. Gov't Code 12945(1)-(2) (1991); Conn. Gen. Stat. Ann. 5-193, *et seq.* (1988); Haw. Rev. Stat. 79-32, 398-1 to 398-10 (1992); Iowa Code Ann. 601A.6(2)(e), 601A.15-.17 (1987); Kansas Commission on Civil Rights, Guidelines on Discrimination Because of Sex, 21-32-6 (D), 21-41-1 to 45-25 (1974); Ky. Rev. Stat. Ann. 337.015 (1982); La. Rev. Stat. Ann. 23:10007-08 (1987); Me. Rev. Stat. Ann. tit. 26, 844-49 (1991); Mass. Gen. Law ch. 149, 105D, ch.151B, 1(5), 4(11A)(1972); Minn. Stat. Ann. 181.940-41 (1987); Mont. Code Ann. 49-2-310 to 49-2-311, 49-2-5-1 to 509 (1984); N.H. Rev. Stat. Ann. 354:A:9-10; N.H. Code Admin. R. Hum. 402.03, 201.01-212.06 (1984); N.J. Stat. Ann. 34:11B-1 to 34:11B-16 (1990); Ohio Admin. Code 4112-5-05 (1989); Or. Rev. Stat. 659.560-570 (1992); R.I. Gen. Laws 28-48-1 to 28-48-10 (1990); Tenn. Code Ann. 4-21-408 (1988); Vt. Stat. Ann. tit. 21, 471-474 (1992); Wash. Rev. Code 49.78.020, 49.78.030 (1989); Wisc. Stat. Ann. 103.10 (1988).

10. Alaska, Colorado, Delaware, Florida, Georgia, Illinois, North Carolina, North Dakota, Oklahoma, Pennsylvania, West Virginia. *See* Alaska Stat. 23.10.500-.550 (1992); Colo. Code Regs. P7-4-12, *et seq.* (1989); Del. Code Ann. tit. 29, 5116 (1984); Fla. Stat. Ann. 110-221 (1991); Ga. Code Ann. 45-24-1 through 45-24-9 (1993); Ill. Ann. Stat. ch. 127, 63b108c (1983); NC State Personnel Manual 8 at 19.2-19.3 (1988); N.D. Cent. Code 54-52.4 (1990); Okla. Stat. tit. 74, 840.7C (1989); Pa. Management Directive 505.7, 30.101-30.115 (1986); W. Va. Code 21-5D-1 to 21-5D-9 (1989).

enacted prior to 1985, six States merely required the provision of minimal leave for pregnancy disability.[11]

In short, Alabama's assertion that the States were leaders in granting family medical care leave is illusory. In many States the availability to their own employees of a few days of sick leave to care for family members, often at the state agency's discretion and without specific job protections for exercising such an option, does not demonstrate that States were leaders on family medical care leave issues.

3. The FMLA's Grant of Twelve Weeks Unpaid Leave Annually to Care for Sick Family Members Is a Proportional and Congruent Response to the Problem Congress Sought to Address

In Congress's informed judgment, an objective standard of unpaid family leave, universally available to employees on a gender-neutral basis, is required as an effective means of minimizing discrimination in employment on the basis of gender and promoting equal employment opportunity for men and women. Congress sought to eliminate the discriminatory effects of over a century of unconstitutional employment laws and practices manifest in the widespread failure of state and other employers to provide adequate family care leave. Congress's choice of remedy is congruent and proportional to the problem, and therefore an appropriate exercise of its power to enforce the Fourteenth Amendment.

11. Iowa, Kansas, Louisiana, Montana, New Hampshire and Ohio. *See* Iowa Code Ann. 601A.6(2)(e), 601A.15-.17 (1987); Kansas Commission on Civil Rights, Guidelines on Discrimination Because of Sex, 21-32-6 (D), 21-41-1 to 45-25 (1974); La. Rev. Stat. Ann. 23:10007-08 (1987); Mont. Code Ann. 49-2-310 to 49-2-311, 49-2-5-1 to 509 (1984); N.H. Rev. Stat. Ann. 354:A:9-10; N.H. Code Admin. R. Hum. 402.03, 201.01-212.06 (1984); Ohio Admin. Code 4112-5-05 (1989).

Congress's decision to remedy the effects of past unconstitutional discrimination does not render the FMLA incongruent or disproportional in any way. Congress's power under Section 5 of the Fourteenth Amendment extends to eliminating the effects of past unconstitutional discrimination, not just current purposeful discrimination. As the Court recently observed, "'legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.'" *Lopez* v. *Monterey County*, 525 U.S. 266, 282-283 (1999); *see also City of Rome v. United States*, 446 U.S. 156, 176 (1980) (upholding legislation that prohibits state laws that "perpetuate[d] the effects of past discrimination"); *Gaston County* v. *United States*, 395 U.S. 285 (1969) (otherwise valid literacy tests may be proscribed to combat the disparate effect on voting of past unconstitutional discrimination in education); *South Carolina v. Katzenbach*, 383 U.S. at 334 (observing that Congress could properly enact prophylactic legislation to prohibit voting requirements that would "freeze the effect of past discrimination").

Congress's congruent and proportional response requires leave policies that allow both men and women an equal opportunity to fulfill family care responsibilities. By requiring leave to be granted on a gender-neutral basis, the FMLA "help[s] to eliminate the stereotype -- no longer valid in today's working world -- that women are exclusively responsible for childcare." *1986 House Hearing*, *supra*, at 147; see H.R. Rep. No. 103-8, pt. 2, at 14 ("A policy that affords women employment leave to provide family care while denying such leave to men perpetuates gender-based employment discrimination and stereotyping and improperly impedes the ability of men to share greater responsibilities

in proving immediate physical and emotional care for their families."). It also eliminates the possibility that women would become less attractive candidates for employment if job-protected leave were only available for working mothers. In addition, it reflects Congress's concern for the constitutional limitations on gender-specific relief. While a gender-specific standard might have made it more obvious that Congress was remedying discrimination, "[i]t is of no consequence that Congress *might* have dealt with the effects of [] discrimination" differently; the "formula chosen by Congress was designed to be speedy, objective, and incontrovertible." *Gaston County*, 395 U.S. at 291-292.

By requiring an objective standard of leave with job protection, Congress's response minimizes the opportunity for discrimination that discretionary leave policies, or leave policies without job protection, provide. Such discrimination is difficult to detect, and where the underlying concern is caring for a seriously ill family member, a remedy that requires proof of discrimination is often too little, too late, while the accusation of discrimination is severely disruptive to the workplace environment.

Moreover, the remedy imposed is highly sensitive to the needs of employers. The Act provides for a maximum of twelve weeks of *unpaid* leave. 29 U.S.C. §§ 2612, 2613. The twelve-week period is neither arbitrary nor intrusive; Congress arrived at that number after substantial input from public and private sector employers over eight years of consideration. *See* S. Rep. No. 103-3, at 12-13; *Ragsdale* v. *Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1164 (2002). The leave provisions apply only to employers having greater than fifty employees and do not require job security for the employers' most highly paid employees. 29 U.S.C. § 2611(3). The Act exempts employees who have not worked for the employer for at least twelve months and a minimum of 1,250

hours. *Id.* § 2611(2)(A). It also requires employees, where feasible, to give employers advance notice and to try to minimize disruption of the employer's operations. *Id.* § 2612(e). Employees must also substantiate, upon request, their family member's serious medical condition. *Id.* § 2613. Moreover, the FMLA is particularly tailored to accommodate the needs of state employers. It does not apply to certain high-ranking or sensitive positions exempt from state civil service laws, such as elected officials or their personal staff, or persons appointed to a policy making or legal advisor role; nor does it cover most state legislative branch employees not subject to state civil service laws. 29 U.S.C. §§ 2611(3); 203(e)(2)(C).

Congress tailored these measures to minimize the economic impact on both public and private employers, while still accomplishing its objectives. In fact, Congress recognized that the costs of the mandatory unpaid leave provisions would be offset by savings resulting from deceased turnover, noting that the net cost of these provisions could be as low as $5.30 to $6.70 per employee per year. *See* S. Rep. No. 103-3, at 16-18; *id.* at 14 (evidence showed that, in the few States that had family leave laws, the mandatory provision of such leave was "neither costly nor burdensome to implement").

Finally, the FMLA encourages States and other employers to adopt more generous leave policies than its provisions mandate. *See Ragsdale*, 122 S. Ct. at 1158-1160. To that end, Congress provided that "[n]othing in this Act * * * shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act." 29 U.S.C. § 2651(b); *see also* 29 U.S.C. § 2653 (the FMLA shall not "be construed to discourage employers from adopting or retaining leave

policies more generous" than those in the Act). Thus, the FMLA will not prevent the States from becoming future leaders on family or medical leave policy.

If Section 5 means anything, it is that Congress has the power to develop a simple and effective remedy to the complex problem of ensuring that the Nation's family leave policies are free from the effects of over a century of well-documented gender discrimination. Congress's decision to require the availability of twelve weeks of unpaid family leave for women and men alike represents a reasonable and appropriate exercise of this remedial authority.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Ninth Circuit Court of Appeals and hold that Congress, in enacting the family medical care provision of the FMLA, validly abrogated the States' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment.

Respectfully submitted,

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